Nos. 11,519 and 11,880

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

ARROW STEVEDORING COMPANY (a corporation),
Appellee.

UNITED STATES OF AMERICA,
Appellant,

vs.

ARROW STEVEDORING COMPANY (a corporation),
Appellee.

On Appeals from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

STATEMENT OF PLEADINGS AND JURISDICTION.

These consolidated appeals concern two final decrees entered by the United States District Court for the Northern District of California, Southern Division, against the United States and in favor of the respective libelants in two separate libels. Appellee

Arrow Stevedoring Company (hereinafter called "Arrow"), which had been impleaded as a respondent in each action by the United States (hereinafter called "the Government") was dismissed. The cases arose out of the same accident but resulted in two separate and distinct trials.

The first case (Williams) was tried before the Honorable Judge Michael J. Roche and a decree was rendered in favor of the libelant and against the Government, and in favor of the impleaded-respondent Arrow. The Mitchell case, which was assigned for trial to the Honorable Judge Louis B. Goodman, was tried, by stipulation, before both Judge Goodman and Judge Roche, sitting jointly. It was further stipulated between the parties that the entire record of the Williams case would be considered by the Court in the Mitchell proceedings.[1] The Government was permitted also to introduce additional evidence in the Mitchell case.

In each case exceptions were filed alleging that Arrow could not properly be joined as a party, since it had provided compensation coverage under the Longshoremen & Harbor Workers' Compensation Act, 33 U.S.C.A. 901-950, and that by reason of Section 905 of said Act, Arrow's exclusive liability for injuries sustained by any of its employees was limited to com-

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[1]To avoid confusion, the same abbreviated references to each case, when referring to the Record will be used as were adopted by the Government in its brief. Reference to the Record in the Williams case, No. 11,519, will hereinafter be designated as "Wms. R." and in the Mitchell or Reite case, No. 11,880, as "Mchl. R."

pensation and medical benefits which benefits it had provided in both cases. The exceptions in each case were overruled, whereupon answers were filed by Arrow denying liability and alleging payment of certain compensation and medical expenditures under the said Longshoremen's Act and praying for reimbursement in each case to the extent of such payments, a lien claim having been filed in the Williams case, but not in the Mitchell case. A decree was entered in the Williams case in favor of libelant and Arrow and against the United States, and a lien was allowed Arrow to the extent of its payments of compensation and medical expenditures. In the Mitchell case a decree was entered in favor of libelant and against the United States and in favor of Arrow. The Government appealed in both cases only from the decrees in favor of Arrow. No appeal as to either of the decrees in favor of libelants was taken by the Government.

Both causes, on motion of the Government, were consolidated for the purpose of presentation of the appeals.

STATEMENT OF THE CASE.

It becomes necessary to supplement the Statement contained in the Government's brief from which certain relevant portions of the evidence have been omitted.

(a) **The Stevedoring Contract.**

It has not been made clear in the Government's brief that the provision of the stevedoring contract (Respondent's Exhibit B, Wms. 265)[3] upon which the Government relies as the basis for its assertion that Arrow agreed to "waive any right of reimbursement for loss or damage", is a part of the limitations and conditions relating to Section (c) of Article 26 under the heading "Liability and Indemnity". The said Section (c) deals exclusively with operations involving "the loading, discharging, handling, presence or proximity of ammunition, explosives, gasoline and other inherently dangerous cargoes." It is further provided that special consideration is to be given to the contracting stevedore under this particular type of cargo. Certain limitations are then provided with respect to this particularly hazardous type of stevedoring, among which is the limitation, supra, set out by the Government as an isolated clause in support of its claim that the Arrow has waived its right of reimbursement. The Government's Statement fails to include the further provision under this section whereby Arrow is held harmless by the Government for any loss or damage caused by Arrow's negligence. This would clearly relieve Arrow of any liability. At any rate, the evidence is undisputed that the work being done at the time of the accident was not the hazardous type above specified. The job had to do with discharging cases of empty cartridges. (Wms. R. 290.)

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[3]For pertinent provisions, see Part I of the Appendix hereto.

It is not true as claimed by the Government that "by reason of the duties which Arrow had undertaken and the terms of its contract, the United States was entitled to recovery-over, in whole or in part, for any liability imposed upon the Government in favor of the libelants." By the very terms of the said contract it is provided that Arrow "shall not be responsible to the United States for any loss or damage resulting from any act or omission of any employee of the Government * * * Nor shall the contractor be so responsible for any such loss or damage resulting from default of ships or other gear supplied by the Government." (Respondent's Exhibit B, Wms. 265.)[2]

(b) The Evidence As To Negligence and Unseaworthiness.

Alf Larson, the gang foreman of the crew in which Williams and Mitchell were working at the time of the accident, testified that as a rule the Navy opened the hatches and rigged the gear (Wms. R. 161-162) and that the day before the accident the Navy petty officer (the Government's representative in charge aboard the vessel) asked him if his gang was going to work the No. 4 hatch that night so he could "get ready and open up the hatch and get it ready" and that Larson told him he thought so, but to "go and see the walking boss." (Wms. R. 163.) Larson's gang quit working that day (the day before the accident) at

[2]Since the Government in its brief has omitted certain relevant portions of the Stevedoring Contract, the full provisions of Article 26, designated under the heading "Liability and Indemnity", are set forth in the attached Appendix as Part I thereof.

6:00 P.M., about two hours after this conversation. (Wms. R. 162.) Just before his gang started working again the following morning at 7:00 A.M., Larson looked down into No. 4 hatch, which was open (Wms. R. 165) and "everything seemed to be safe" (Wms. R. 164), whereupon he ordered the men to go to work. No cargo had been removed from this hatch prior to the accident. (Wms. R. 165.) A skow was lowered into the hatch and no part of it or the falls touched the hatch cover. About five minutes thereafter, as a result of the possible vibration caused by the vessel's striking the dock due to the wash of a passing vessel, Larson saw the hook on the forward end of the hatch door slip, and yelled down to the men "Look out". (Wms. R. 167-168.) Before the men could get clear the hatch door fell upon two of the stevedores. No member of this gang had rigged the falls or raised the hatch cover. (Wms. R. 168.) After the accident when the tank tops had been lashed together by the Navy crew, Larson noticed that the after hook on the hatch cover was bent (Wms. R. 181) and that there was no pin to lock the forward hook. (Wms. R. 182.) So far as Larson was concerned, this type of locking device was new, and he had never used a similar one before. Previously they had "always used a bolt or a shackle". (Wms. R. 183.)

The Government produced as a witness Herbert Carnes, Boatswain's Mate Second Class, who was purportedly on the vessel at the time of the accident, but who could not state whether or not he had talked with Larson. (Wms. R. 211.) Carnes admitted that it was

difficult to lock the hooks on the hatch door, since it was necessary to climb on a box or use a bar or broom handle to reach the hooks, none of which equipment was readily available. (Wms. R. 254-255.) Carnes also testified that Navy personnel was available all during the night preceding the accident to do any necessary work on the ship. (Wms. R. 221.)

The Government also called as a witness Claude Bowers, who was the foreman in charge of the stevedores working on the shift just prior to the accident. He testified that sometime after midnight, about 1:30 or 2 A.M., he went to one of the Navy officers and asked him to retrim the rigging for the offshore tank (where the accident subsequently occurred) because the cover was not in proper position (Wms. R. 281), the rigging was not adequate, and the pins in the locking device were bent and would not fit into position (Mchl. R. 54-55); that this Navy officer, who was in charge of the particular hatch, informed him that he could not get the work done at that time, but would "get it fixed as soon as he had the men available". (Mchl. R. 59.) (Carnes said he had men available all night.) The Navy did not give Bowers any instructions as to how to secure the hatch door (Mchl. R. 59), and there was no equipment with which they could have lashed the doors. (Mchl. R. 61.) A person standing at the top deck could not tell whether the dogs or hooks were properly locked or whether the pins were in position (Mchl. R. 62), but in any event, the hatch appeared to be all right when his gang left the hatch door to work on the other side. (Mchl. R.

67-68.) He further testified that the general rule on Navy ships is for the Navy to rig the gear and that "the stevedores are not supposed to touch it" and that it was not the job of the stevedores to lash the tank tops, but that "that was the Navy's job". (Mchl. R. 72.) Also, that there was nothing with which to lash the covers. (Mchl. R. 71.) Bowers further testified that there was no exact practice by stevedore foremen as to the extent of their inspection of hatches prior to sending men to work; that there are many things which would occupy the time of the foremen, and that it would be proper to look at the hatch door from the top deck. (Mchl. R. 86-88.) The night gang quit and left the ship at 6 A.M. and Bowers left shortly before 7 A.M.

Another member of the night gang of stevedores, one Anzulovich, was produced by the Government and testified that he helped open the hatch door and that he "thought it was safe by itself" and that he never thought it would come down. (Mchl. R. 92.)

Joseph Kokicks, another stevedore on this gang, testified for the Government that he helped open the hatch door and put the hooks on. (Mchl. R. 95.) In no part of his testimony did this witness say that the condition of the hatch door appeared to be unsafe prior to the time the door came down.

Martin O'Shea, foreman of the day gang, testified as a witness for the Government and denied that Bowers had any discussion with him concerning the hatch door. He stated that when a hatch door of this type

is up, it is considered to be safe. He further testified that "they opened it in the day-time, because in the day-time I seen them; the Navy did it; I don't know whether they did it that night or not." He later stated, however, that "it was open in the morning when I came in" and that he did not know who opened it. (Mchl. R. 101.) In any event, he saw nothing to indicate danger to his men and therefore directed the men to go ahead with the work. No special or detailed examination is made in such instances, unless something is brought to his attention. (Mchl. R. 102.) On Navy ships, as distinguished from commercial vessels, Navy personnel does the checking of appliances and equipment and there is very little done by the stevedores in this respect. (Mchl. R. 103.) It is therefore not customary or even permissible for the stevedores to check and make inspections of such equipment and appliances.

SUMMARY OF THE ARGUMENT.

(1) The sole proximate cause of the accident was the unseaworthiness of the vessel in that the port No. 4 hatch door was defective due to the bent condition of one of its hooks and the absence of a locking pin.

(2) There was no negligence on the part of Arrow or its employees proximately causing or contributing to the happening of the accident.

(3) The Findings of Fact and Conclusions of Law are fully supported by substantial evidence and should not be disturbed on appeal.

(4) The Government's appeal from the trial Court's decrees is nothing more than an attempt to have the cases heard *de novo,* which procedure is not available in view of the fact that the oral testimony of all the witnesses was heard by the trial Court and its decrees are supported by substantial evidence.

(5) The stevedoring contract provides that Arrow shall not be liable for loss or damage occasioned by negligence of the Government's employees or unseaworthiness of its vessel; consequently, Arrow is not liable-over to the Government since there is substantial evidence in the record that the sole proximate cause of the accident was the vessel's unseaworthiness and negligence of the Government's employees in failing to correct such condition after due notice thereof.

(6) The Longshoremen & Harbor Workers Compensation Act prohibits recovery against employer Arrow other than for compensation and medical benefits under the provisions of said Act. Arrow's liability either to its employees or to "anyone" otherwise entitled to recover is limited exclusively to the benefits prescribed by said Act.

(7) Arrow cannot be held liable-over to the Government in any event, since the Government failed to appeal from the decrees in favor of libelants. If, as contended by the Government, the negligence of Arrow was the sole proximate cause of the accident, neither the Government nor Arrow could be held liable. The Government's failure to prosecute appeals from assertedly unlawful decrees against it defeats any possible claim for recovery-over against Arrow.

I.

THE PROXIMATE CAUSE OF THE ACCIDENT WAS THE UNSEAWORTHINESS OF THE VESSEL AND NEGLIGENCE OF GOVERNMENT EMPLOYEES IN FAILING TO CORRECT THE DEFECTIVE HATCH COVER AFTER NOTICE THEREOF.

There is ample evidence in the record showing that the cover of the No. 4 hatch of the vessel was defective in that the locking devices failed adequately to lock the hatch door in an open position. The stevedores of the night shift opened the hatch cover and secured it as well as they could. The foreman of that gang advised the Navy officer, the Government's supervising officer aboard the vessel, of the fact that the pins to secure the hatch door were "bent and wouldn't go in" and that the rigging had not been properly set up by the Navy crew. (Mchl. R. 54, 55.) The Navy officer assured the stevedore foreman that he would have the condition fixed as soon as he had the men available. Carnes, the Navy officer in charge of the work at this hatch, testified that he had men available all night. (Wms. R. 221, 249.) However, the evidence is uncontradicted that the Government allowed the hatch cover to remain in this condition from approximately 1:30 o'clock in the morning until shortly after 7:00 A.M. of that day when the accident occurred. No effort whatsoever was made by the Navy to correct this defective condition until after the accident occurred. The gang of stevedores which came to work at 7:00 A.M. on that morning, finding the hatch open and in a position to permit them to commence their discharging operations, started to work in the usual and customary manner. Through no fault on the part of the

stevedores, the hatch cover fell because of its defective condition and possible vibration of the vessel hitting the dock, as the result of the wash from a passing vessel. (Wms. R. 168.)

There was no duty on the part of the stevedores, through custom, agreement or law, to make any inspection of the area in which they were working other than the observations made by them and their foreman. The evidence is uncontradicted that on Navy ships the Navy personnel check the gear, equipment and appliances and that no detailed inspection is made by the stevedores or allowed by the Navy. (Mchl. R. 103-105.) There was certainly no contributory negligence on the part of the stevedores or their superiors in attempting to carry on their work under the conditions which were presented to them. There was no notice to the foreman or any members of the gang of any inherently dangerous condition which would have prevented reasonable men under the same circumstances from proceeding with their work. This particular hatch door was of a new and unusual type, unfamiliar to the stevedores, who had no prior experience or knowledge concerning this particular appliance. (Wms. R. 183.)

The gang on the prior shift, that is the night gang, which worked until 6:00 A.M. of the day of the accident, was required to do no work at that particular part of the hatch after opening the hatch doors and notifying the Navy of the defective and improper conditions and after having been assured by the Navy that these conditions would be promptly

remedied. No attempt whatsoever was made by any of the Government employees to correct these conditions until *after* the accident occurred. Immediately following the accident, the Navy secured the hatch doors by means of a turnbuckle and securely fastened the hooks with pins within a matter of a very few minutes, (Wms. R. 234, 258), all of which could and should have been done by the Navy personnel prior to the unfortunate accident. Herbert Carnes, who was the Navy man in charge of this work, testified that he had men available "at any time of the night" (Wms. R. 221, 249) and yet the unseaworthy condition of the hatch door was permitted to remain unrepaired for a period of over five hours from approximately 1:30 A.M. (Mchl. R. 54), when the conditions were called to the attention of the Navy, until shortly after 7:00 A.M. when the accident occurred.

Although Government counsel at this point of the Williams trial stated there were alleged written orders and regulations with regard to purported duties of the stevedore crew to lift the hatch doors, such alleged evidence was never produced either at the Williams trial or in the Mitchell case, tried ten months later, despite counsel's statement that "the written orders can be made available." (Wms. R. 226.) An effort was made by Government counsel to show, through Carnes, that the dogs and pins were in good working condition immediately after the accident and that, consequently, there was nothing defective about the hatch door, the dogs or the pins. (Wms. R. 234.) The trial Court obviously chose to disbelieve such testimony in view of

its complete variance with the facts. It is of some significance to observe that the Government subsequently abandoned this theory.

Government counsel seek, unsuccessfully, to explain away the glaring conflicts in the testimony of their own witnesses, particularly that of Bowers and O'Shea, who disagreed as to whether or not certain conversations were held. The position taken by the Government, consequently, is that:

> (1) Whether or not Bowers told O'Shea of the condition of the hatch door, "Arrow is responsible for the knowledge which it gained through Bowers, its night walking boss, even though he failed in the performance of his duty to Arrow in communicating such knowledge to O'Shea, its day walking boss", and,
>
> (2) "Even if Bowers' testimony is totally disregarded, still the testimony of Arrow's day gang boss, Larson, at the Williams trial, and Arrow's day walking boss O'Shea at the Mitchell trial", establishes that "Arrow is chargeable with their negligence in failing to make any inspection whatsoever with a view to ascertaining whether or not the hatch cover was in a safe condition before they sent their men to work beneath it." (Government's brief p. 28.)

As to the first point, there was no duty on the part of Bowers to convey any knowledge to anyone after being assured by the Navy officer in charge of the hatch that the conditions would be corrected. Bowers removed his gang from that part of the vessel and, after having received the assurances he did, he cer-

tainly had the right to assume that those who were responsible for the correction of such conditions would carry out their promise and absolute duty to do so. There was a period of five and one-half hours during all of which time the necessary Naval personnel was available to correct the defective conditions. During the evening prior to the accident some of the Navy crew had been allowed to go ashore. However, according to Herbert Carnes, the Navy officer in charge, "the remaining men aboard were there to handle any ship work coming up during the night." (Wms. R. 221.) It would seem clear, therefore, that the vessel's supervising officer was advised of the defective condition, that he promised to make the required corrections and that the necessary men were available to carry out such work. While there is some testimony concerning the alleged unavailability of a Navy crew on the evening before the accident, the Government's own witness, Herbert Carnes, who testified that he was in charge of the work to be done at the hatch on behalf of the Navy, testified that he had men available all that evening to do any work on the ship that was required to be done. (Wms. R. 221, 249.)

As to the second point—that Arrow is chargeable with the alleged negligence of the stevedore foremen in "failing to make any inspection whatsoever with a view to ascertaining whether or not the hatch cover was in a safe condition"—it is respectfully submitted that such statement is not supported by the evidence. Larson testified that he looked at the hatch from the top of the deck, which was the usual and normal ob-

servation on Navy ships, and "everything seemed to be safe." (Wms. R. 164.) O'Shea also testified that he considered the hatch to be safe, since it was open, and in line with the custom on Navy ships, when the hatches were open they were presumed to be safe to work in; also that he had noticed that the Navy opened the hatch in the day-time but did not know whether they opened it during the night or not. (Mchl. R. 101.) As to the matter of detailed inspections, O'Shea, the Government's witness, testified as follows:

"CROSS-EXAMINATION

By Mr. Kay:

Q. Mr. O'Shea, had you worked on a number of Navy ships?

A. Oh, quite a few.

Q. And on all of these does the Navy allow you to go around and check everything on the ship?

A. No, they check themselves. Everything is checked by the Navy.

Q. Yes, and there is very little you do——

A. Very little.

Q. Just a minute. There is little you do in the way of going around checking every particular piece of equipment on Navy ships. Isn't that right?

A. That is right.

Q. The Navy does all that?

A. Yes.

Q. They set up the rigging for you. They generally open the hatches for you?

A. They do.

Q. And then you do not go around to see if every hook is in place and every pin is in, do you?

A. Surely not." (Mchl. R. 103-104.)

It follows, therefore, from the testimony, particularly that of the Government's own witness, Michael O'Shea, that Arrow's foreman and his men did all that was customary and permissible on Navy ships in the way of checking equipment. They looked at the hatch door and it appeared to be safe to them and, accordingly the stevedores began to carry out their work.

At this point we desire to comment on the Government's rather absurd argument concerning Arrow's asserted burden of offering the testimony of its employees. In this regard, it is stated at page 30 of the Government's brief:

> "The testimony of any of its employees was elicited solely as a result of certain of them having been called by libelant and the Government. Arrow itself compelled the other parties to call its people as adverse witnesses."

It should be perfectly clear to anyone that as a matter of procedure Arrow, the impleaded respondent, had no burden, indeed had no right, to produce witnesses until after the libelant in each instance had put on his case followed by evidence which the Government, as the respondent, was required to offer as a defense to the libel. Arrow, having been impleaded as a respondent by the Government, would only be required to *meet* evidence adverse to it. Consequently, Arrow did not and could not have called any witnesses until the other parties had proceeded with their evidence. If the Government chose to call as its own witnesses certain employees of Arrow whose testimony

at the trials proved to be unfavorable to the Government, there can surely be no valid criticism against Arrow in this respect.

On the question of a stevedore contractor's asserted duty to check the ship's appliances, certain cases are set forth on page 29 of the Government's brief. None of the cases cited involves a vessel owned and operated by the United States Navy. According to the uncontradicted evidence, the practice is for the Navy crew to make all the necessary inspection on Navy ships. The case of *Grillo v. Royal Norwegian Government,* 139 Fed. (2d) 237, had to do with an injury to a stevedore in the employ of a stevedoring company, who fell as the result of a defective Jacob's ladder which he was using to go ashore to get a crow-bar on the dock. The Court held, with regard to the vessel's affirmative duty to provide the stevedore a safe Jacob's ladder for use in getting to and from the vessel (p. 238), as follows:

> "Hence the case comes down to whether there is such an affirmative duty in the premises. Unless there is some reason for making an exception, the situation was the conventional one, which used to be called that of an 'invited person' and which is now called that of a 'business visitor'. (Restatement of Torts, Section 343, Comments (a) (e) and (f)). The work going on was in the ship's interest—loading her for a prospective voyage in search of profit—and the libelant was obliged to mount the ship's side in order to perform it. * * * We hold, therefore, that the ship in the case at bar did owe such duty to the libelant and that she failed to discharge it."

The decree in favor of the libelant and against the vessel was affirmed. We are unable to see how this case could possibly support the Government's position. It is clear that the Court held that the vessel owed an "affirmative duty" to provide a safe and seaworthy Jacob's ladder to the "business visitor" (the stevedore). Likewise, the Government owed an "affirmative duty" to provide a safe and seaworthy hatch door to the "business visitors" (i.e. the stevedores) in the present proceedings.

The Government further argues that the case of *Seaboard Stevedoring Company v. Sagadahoc SS Company,* 32 Fed. (2d) 886, is applicable. Emphasis is placed on the Court's statement that the ship's officers are not required, for the benefit of stevedores, "to exercise a high degree of vigilance to see that it performs a plain duty". The *Sagadahoc,* however, did not involve the immediate contracting stevedore, whose employee was injured, but was an action for recoupment against a prior stevedore company at a different port who had not properly replaced the vessel's hatch boards. This Court's pronouncement that the ship's officers were not required "to exercise a high degree of vigilance to see that it performs a plain duty" referred to the prior stevedore company, not the employer of the injured man. As this Court is aware, the *Sagadahoc* was held liable to a stevedore injured in Portland as a result of improperly placed hatch boards which had been last handled by stevedores in San Francisco. The libelant, Freshley, sought and obtained recovery from the *Sagadahoc* based upon

the unseaworthy condition of her hatches. His injury was suffered under circumstances similar to the matter at bar, in that both the *Sagadahoc* and the *Edgecombe* were unseaworthy, the only difference in the two cases being that the Government cannot claim here that some third party at a different port was responsible for its defective and unseaworthy gear. Moreover, as indicated at page 36 of the Government's brief, recovery was allowed to the *Sagadahoc* against the stevedore company which created the unseaworthiness because the vessel's officers had no knowledge of the hazard. From the verbiage of the opinion of the Court in that case, it is clear that had notice of the defective condition been brought home to the ship's officers, no recovery could have been had against the first offending stevedores.

As we have elsewhere shown, it is manifest that the vessel's officers in the instant case had full knowledge of the defective condition of their vessel and adequate time and available personnel to make the necessary corrections. Having failed to do so, the ship's officers were clearly negligent and the injury to Williams and the death of Mitchell were solely and proximately caused by the unseaworthy condition of the vessel and the negligence of its officers.

II.

THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE.

There is no basis for the Government's complaint that the Findings of Fact and Conclusions of Law as ultimately found by the trial Court were, instead, the Findings of Fact and Conclusions of Law of the successful parties. Unless it can be shown that the findings of fact are not supported by substantial evidence, it must be presumed that the findings of fact, as well as the conclusions of law, which were entered in these cases, were carefully considered and adopted by the trial Court and, consequently, should be allowed to stand.

The authorities set forth by the Government in its brief at page 27 do no more than lay down the broad proposition that findings of fact should be based upon some substantial evidence. As stated in one of these authorities, *The Severance,* 152 Fed. (2d) 916, 918, "This practice (adoption *in toto* of proposed findings and conclusions) is not to be commended. It has been condemned by many courts as not living up to the provisions of Admiralty Rule 46½; 28 U.S.C.A. following Section 723 * * *." The Court went on to add, however, "We do not hold that the practice affords a ground for reversing the decree of the District Court."

In another case cited by the Government, *Hutchinson v. Dickie,* 162 Fed. (2d) 103, 106, findings of fact were criticized since they were shown to be "intermixed findings of both law and fact". But the Court

finally treated them as conclusions of law. With respect to definite findings of fact, it was stated that "the Court saw the witnesses and heard their testimony and this finding must prevail", citing *Peterson Lighterage & Towing Corp. v. New York Central R. Co.,* 126 Fed. (2d) 992.

The case of *Great Atlantic & Pacific Tea Company v. Brasileiro,* 159 Fed. (2d) 661, 665, is merely a holding by the Court that "the finding of negligence was not a finding of fact, which must be 'clearly erroneous' to be subject to review." Also in the case of *Johnson v. Kosmos Portland Cement Company,* 64 Fed. (2d) 193, 195, it was ruled that a particular finding of the Court below that respondent had failed to use reasonable care was "a mixed question of law and fact" and that where "the finding is of an ultimate fact, and the law applied reposes in the mind of the Court, it must be clear that the finding is at least a mixed finding of law and fact, as to which no presumption of correctness obtains." Nonetheless, the Court significantly held: "It is the rule in this and other Circuits that while an appeal in admiralty is a trial *de novo,* the findings of the District Court will be accepted unless clearly against the preponderance of evidence". (Authorities cited.)

Counsel for the Government argue that the Court's findings are "clearly erroneous and contrary to the evidence insofar as they purport to hold that the employees of Arrow were free from negligence". There is more than adequate support for the Court's findings in the record. The Government grasps at disconnected

straws in the testimony of one of its own witnesses, Claude Bowers, in an effort to establish that he, Bowers, was allegedly negligent in his asserted failure to point out the dangerous condition of the hatch cover to the stevedore boss on the succeeding shift. In this regard, it must be stated that Bowers' testimony, in many respects, was inconsistent and unreliable. The Court in both trials chose to disbelieve certain portions of the testimony of this Government witness, accepting other parts thereof. Although no testimony was elicited from Bowers at the Williams trial that he communicated with O'Shea, the walking boss on the day shift, the Government again produced him in the Mitchell trial and, at that time, offered such testimony. This was an obvious, though lame, attempt to bolster the Mitchell case with evidence which the Government apparently felt was the missing link in the Williams trial. Unfortunately for the Government, however, its witness O'Shea contradicted Bowers and testified there had been no such discussion.

The problem of determining the weight to be given to the testimony of witnesses who have testified orally is, of course, for the trial Court to determine, and the situation here presented is a rather clear example of why trials *de novo* are frowned upon by the Circuit Courts, since they, in considering an appeal, do not have the opportunity to see and hear the witnesses and, hence, are in no position to separate the chaff from the wheat. (The matter of trial *de novo* will be more fully discussed hereafter.)

Assuming that Bowers, some five and one half hours before the accident, had knowledge of conditions which would make it unsafe to work in the hatch at that time, the record is without conflict that he immediately communicated these facts to the Navy officer in charge of the hatch and no further work was done there by the stevedores. (Wms. R. 289); (Mchl. R. 54.) This Government witness further testified that the Navy officer informed him that the hatch conditions would be corrected. No instructions were given by the Navy as to how to secure the hatch door (Mchl. R. 59), and there was no equipment with which the stevedores could have lashed the doors. (Mchl. R. 61.) Bowers' gang left the vessel at 6:00 A.M. and, during the one hour interval between that time and the commencement of the next shift, no stevedoring work whatsoever was done on the vessel. Also, during this hour interval the Navy crew and officers were aboard. (Mchl. R. 77.) When the day gang came to work at 7:00 A.M., O'Shea's gang boss, Alf Larson, looked at the open hatch from the top of the deck and "everything seemed to be safe". (Wms. R. 164.) Other witnesses called by the Government also testified that the hatch looked all right to them. (Mchl. R. 92.) The record is without conflict that no detailed inspection or examination of the vessel or its appliances is made by stevedores or permitted by the Navy on Navy vessels, all such inspections being carried on solely by the Navy personnel. (Mchl. R. 102-103.)

The accident occurred without any contributing negligence on the part of either O'Shea or Larson, or any

of the stevedores, the hatch door having fallen because of the failure of its locking device to hold in the presence of vibration, possibly caused by the vessel's striking the dock due to the wash of a passing ship. (Wms. R. 168.)

The District Court's findings of fact being wholly supported by the evidence, it follows that said findings are not erroneous and therefore should, together with the Court's conclusions of law, stand in both cases.

III.

A TRIAL DE NOVO IS NOT AVAILABLE TO APPELLANT IN EITHER CASE, SINCE ALL WITNESSES TESTIFIED ORALLY BEFORE THE TRIAL COURT.

The witnesses in the Williams as well as in the Mitchell case appeared in person and testified orally. No evidence was heard by way of deposition. We respectfully suggest that this consolidated appeal, which involves only issues of fact is purely an attempt to have the causes heard *de novo* by this Honorable Court.

It is not believed that the Court should or will try these cases *de novo*. The rule appears to be well settled that the trial Court is in a better position to judge the credibility and to give weight to the evidence when all the testimony is adduced from witnesses personally present.

In the case of *Catalina-Arbutus*, 95 Fed. (2d) 283, Judge Denman of this Court stated:

> "While this admiralty appeal is a trial de novo the presumption in favor of the findings of the District Court is at its strongest, since the trial judge heard all the witnesses, save one, and his deposition clearly sustains those heard. Ernest H. Meyer (9CCA), 1936 A.M.C. 1179, 84 Fed. (2d) 496, 501; Silver Line et al. v. United States, et al. (9CCA), 1938 A.M.C. 521."

To the same effect is the case of the *City of New York v. National Bulk Carriers, Inc.,* 138 Fed. (2d) 826, wherein it was said:

> "It appears to be impossible to convince the bar that we will disturb findings of fact as seldom in admiralty causes, as in any other. Whether there lingers a notion—never in fact justified—that because an appeal in the admiralty is a new trial, the scope of our review is broader, we cannot know; but over and over again appeals are taken without the least chance of success except by oversetting findings of fact upon disputed evidence. In order to meet this persistence we may in the end find ourselves forced to invoke the penalty provided in Rule 28 (2) of this Court."

To the same effect are many other cases, including:

"Heranger", 101 Fed. (2d) 953 (9CCA);
City of Cleveland v. McIver, 109 Fed. (2d) 69;
Commercial Molasses Corp. v. New York Tank B. Corp., 114 Fed. (2d) 248;
The S.C.L. No. 9, 114 Fed. (2d) 964.

This Court on June 16, 1947, in the cases of *Tawada v. United States,* 162 F. (2d) 615, spoke as follows on this precise point:

"(1) In an appeal in admiralty, where a substantial part of the evidence was heard in open court, the 'correct rule' is that the findings of the trial Court 'are accompanied with a rebuttable presumption of correctness'. Thomas v. Pacific S.S. Lines, Ltd., 9 Cir., 84 F. (2d) 506, 507, 508; The Pennsylvanian, 9 Cir., 149 F. (2d) 478, 481. And 'where all of the evidence is heard by the trial judge and the question is one of credibility of witnesses on conflicting testimony, the presumption (that the findings of the District Court are correct) has very great weight.' "

This Court succinctly stated the rule in *Stetson v. United States,* 1946 A.M.C. 900, 155 Fed. (2d) 359 (C.C.A. 9th) and in *Bornhurst v. United States,* 1948 A.M.C. 53 (C.C.A. 9th) as follows:

"The findings are supported by substantial evidence, are not clearly erroneous, and hence should not be disturbed."

The facts in relation to every material issue in the matter at bar were decided by the District Court in favor of appellee and against appellant. A trial *de novo* is therefore not available to the Government.

IV.

IF, AS CLAIMED BY APPELLANT, THE NEGLIGENCE OF APPELLEE WAS THE SOLE PROXIMATE CAUSE OF THE ACCIDENT, NEITHER PARTY COULD BE HELD LIABLE AND APPELLEE ARROW IS THEREFORE NOT LIABLE-OVER TO APPELLANT UNITED STATES.

A rather amazing argument is made in the Government's brief, in support of its claim that Arrow is

liable-over to the Government for amounts required to be paid under the decree. In this respect, it is argued by the Government that since Arrow's negligence was the *sole proximate cause* of the accident "the United States is entitled to recovery-over of the full amount it has been required to pay libelants."

If, as claimed by the Government, the negligence of Arrow was the sole proximate cause of the accident, it is axiomatic that no decree of any kind could have been entered against the Government. In a tort case, liability cannot be fastened without fault. The Government, by failing to appeal from the decrees in favor of libelants, admits its responsibility to them. This fact naturally prompts the inquiry: what responsibility? The only possible answer is the responsibility for the Government's fault, viz.: the vessel's unseaworthiness, or negligence of its employees. As we have heretofore pointed out, if sole fault rested with Arrow, no recovery under any theory could have been had against the Government or, for that matter, against Arrow, whose liability to the libelants would be governed exclusively by the Longshoremen & Harbor Workers' Compensation Act, supra. We submit that the Government's satisfaction with and concurrence in the decrees against it and in favor of libelants, gives the complete lie to its written position as set forth in its brief.

Surely, appellant is not entitled to recovery-over from Arrow Stevedoring Company on any conceivable basis in view of the Government's failure to appeal as to the decrees in favor of libelants, in the face of its

claim that Arrow's negligence was the *sole* proximate cause of the accident. See *Desiano v. United States of America,* 1946 A.M.C., 544, where an injured stevedore claimed that his injury was the result of a defect in the ship's winch. It developed at the trial, however, that the accident was due to the improper operation of the winch by the stevedore and even though there may have been "some defect in the winch which would cause the draft to slip downward, it is obvious that this could have no causal relation to the subsequent behavior of the draft." The libel was accordingly dismissed, since it was shown that the sole proximate cause of the accident was the negligent operation of the winch. In *Shelton et al. v. Sea Shipping Company et al.,* 1947 A.M.C., 1528, a stevedore winch driver was fatally injured as the result of being struck by a fair-lead after the cable had parted due to sudden stress put on by the winch driver. In denying recovery to the executrix of the estate of the deceased, the Court held (p. 1537) " * * * all the plaintiff is required to show, in order to recover in this action, is that the SS *Robin Tuxford* or her appliances was unseaworthy. However, the plaintiff has failed in this requirement * * *". Since negligence in the operation of the winch was held to be the sole proximate cause of the accident, recovery was denied. See also *Braner v. Brooklyn Eastern Dist. Terminal,* D.C., 46 Fed. Supp. 302.

V.

THE STEVEDORING CONTRACT RELIEVES ARROW OF ALL LIABILITY UPON PROOF OF UNSEAWORTHINESS OF THE VESSEL OR NEGLIGENCE OF THE GOVERNMENT'S EMPLOYEES.

The stevedoring contract (Part I of Appendix hereto) clearly absolves Arrow Stevedoring Company from liability in any event, since that contract provides that Arrow shall not be responsible to the Government for any loss or damage resulting from an unseaworthy condition of the Government's vessels or from negligence on the part of any employee of the Government.

It is contended by the Government that the contract does not deprive the United States of its right to recovery-over and that, furthermore, it expressly gives the Government the benefit of Arrow's compensation insurance.

Article 26 of the contract is entitled "Liability and Indemnity". Section (b) thereof provides that the stevedoring company shall be liable to the Government for loss or damage "as a result of the negligence or wrongful acts or omissions of the contractors (Arrow) officers, agents or employees or through fault of its equipment or gear, *subject, however, to the following limitations and conditions:* * * *" (Emphasis added.) One of these limitations and conditions is as follows:

> "(2) The contractor (Arrow) shall not be responsible to the United States for any loss or damage resulting from any act or omission of any employee of the Government * * *. Nor shall the

contractor be so responsible for any such loss or damage resulting from default of ships or other gear supplied by the Government."

In the Government's brief at page 44, it is claimed that the language "default of ships or other gear supplied by the Government" does not cover appliances such as the hatch, hatch door and its locking devices, the unseaworthiness of which caused the accident herein. This contention hardly requires an answer. Bowers, a Government witness, testified that "gear" would "take in the tanks, too." (Mchl. R. 55.)

The term "gear" is defined by Roget's International Thesaurus as being synonomous with "equipment", "apparatus", fittings", and "fixtures".

It is plainly obvious from the foregoing that the contract, which was formulated by the Government, provides for liability on the part of the contracting stevedore company where damage results from the negligence of its agents or employees, subject, however, to the limitation and condition that the contractor shall not be so responsible where the damage results from an act or omission of an employee of the Government or from a defect in its vessels or equipment supplied by the Government. It would be superfluous for the Government to insert these *limitations* and *conditions* unless it was intended to absolve the stevedoring contractor from liability in any case where the injury or damage was in any way caused or contributed to by negligence of the Government's employees or through fault of the vessel or its defective equipment. If this were not the intention, it would

have been entirely unnecessary and pointless for the Government to have included any such limitation for the obvious reason that if the damage were *solely* caused by the Government through its employees or through defective ships or equipment, the stevedoring contractor could not possibly, under the law, be held liable.

Liability on the part of the stevedoring contractor is, therefore, intended to be imposed only when its negligence causes damage or injury without intervening or concurring negligence on the part of the Government employees or by reason of a defect in the vessel or its equipment. In this connection it is well to note that the provision upon which we rely is a *limitation* and *condition* of and to the section which provides for liability on the part of the stevedoring company. Such a clear-cut condition and limitation would seem to dispel any claim of ambiguity as to the intention of the drawer (the Government) of the contract. Assuming that there is any ambiguity, or uncertainty, it is of course elementary in the law of contracts that, in seeking an interpretation of any such provisions, the courts strictly construe the language and resolve any doubt as to the true meaning and construction of the wording used, against the maker of the contract and in favor of the other party thereto.

See generally: 13 *Corpus Juris* § 516, p. 544.
Bijur Motor Lighting Co. v. Eclipse Machine Co., 237 F. 89;
Southern Railway v. Coca-Cola Company, 145 F. (2d) 304.

In the last cited case, the Fifth Circuit Court of Appeals held (p. 307) that

> "When the words of a contract are ambiguous, it is a well-known and worthy maxim of our law that such ambiguities should be resolved against the person who drew the contract and selected its terminology and nomenclature." (citing cases.)

See also: Sec. 1654 Civil Code of California.

Glen v. Bacon, 86 Cal. App. 58 where the ambiguity in the meaning of clauses in a lease was resolved in favor of the lessee, the lessor being the scrivener.

Coast Mutual Building-Loan Assoc. v. Security et al., 14 Cal. App. (2d) 225

where the court held that a clause in an insurance contract should be interpreted most favorably to the insured.

Earl Ranch v. Marchus, 60 Cal. App. (2d) 379 in which the court applied section 1654 of the Civil Code of the State of California, and ruled that:

> "The language of the contract shall be interpreted most strongly against the party who caused the uncertainty to exist."

In line with the general purpose of securing stevedoring services during the wartime and bestowing liberal conditions to encourage full assistance and cooperation, the Government undoubtedly desired and intended to relieve the stevedoring company of any responsibility for accidents caused or contributed to by some negligent act or omission of a Government employee or by an unseaworthy vessel. This can be the only logical and understandable reason for the

language selected and used by the Government in the stevedoring contract involved in these proceedings. We do not see any ambiguity.

As to the Government's claim that the contract gives it the benefit of Arrow's compensation insurance, we believe this assertion hardly requires an answer. Section (a) of Article 26 simply requires that Arrow shall maintain insurance coverage insuring itself against liability for injury or death and for property damage. Subsection (4) of Section (c)—set forth on page 7 of the Government's brief in such a manner as to give the impression that it refers to Section (b)—is clearly a provision requiring Arrow to "waive any right of *reimbursement* for loss or damage of any kind or character which it may have *against* the Government" where such damage is covered by insurance and where Arrow "has collected or may collect for such loss or damage from the insurance company." (Emphasis added.)

Arrow is not seeking "reimbursement" by reason of any right "against" the United States. Its lien claims are on the judgments which were entered in favor of libelants. Furthermore, the section relied upon is a limitation of and refers directly to section (c) which has to do exclusively with hazardous loading or discharging operations such as handling of "ammunition, explosives, gasoline and other inherently dangerous cargoes". (See Part I of Appendix hereto.) There is no dispute here as to whether the cargo being discharged was of such nature; it involved cases of empty cartridges. (Wms. R. 290.) If the

Government is entitled to rely on this section, then Arrow could not possibly be held liable-over to the Government, because there is a hold-harmless provision in favor of Arrow in the same section as follows:

> "* * * the Government will hold the contractor (Arrow) harmless against any loss, expense (including expenses of litigation) and liability to third persons because of death, bodily injury or property damage or destruction or otherwise of any kind whatsoever, *irrespective of the negligence of the contractor, its agents, officers, servants or employees.*" (Emphasis supplied.)

Aside from the foregoing provision of the contract, Subsection (2) of Section (b), supra, clearly absolves Arrow of all liability in the premises.

VI.

INASMUCH AS ARROW SECURED COMPENSATION COVERAGE UNDER THE PROVISIONS OF THE LONGSHOREMEN AND HARBOR WORKERS' COMPENSATION ACT, IT CANNOT BE HELD LIABLE-OVER TO THE GOVERNMENT.

Arrow, having secured compensation coverage under the Longshoremen & Harbor Workers' Compensation Act cannot be held liable-over to the Government. There is no dispute in the record concerning the fact that Arrow at the time of the accident had complied with the terms of the said Longshoremen's Act, 33 USCA 901-950. Section 905 of said Act, under the heading "Exclusiveness of Liability" provides in part as follows:

> "The liability of an employer * * * shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin and *anyone* otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death * * *". (Emphasis added.)

We are of course aware of the several District Court decisions in which it has been held that notwithstanding the fact that an employer has secured compensation coverage under the Longshoremen's Act, he may still be impleaded by a third party who has been sued by an employee of said employer. We are in complete disagreement with those holdings and we feel that the only logical ruling should be as laid down by District Judge McCulloch of the District of Oregon in the case of *Leon E. Johnson v. U. S. A. et al.,* Civil No. 3884, decided June 19, 1948. Opinion in full is set forth as Part II in the attached Appendix.) Judge McCulloch ruled that "to hold that an employer under a compulsory (as to him) compensation act can be sued indirectly, as proposed here, is like opening a hole in a dyke, it destroys the basic purpose of compensation. As well say that the employer can be offered to the injured workman as a co-defendant under Rule 56. The difference is a matter of words only."

Judge McCulloch, as he points out in his opinion, concurred with Judge Inch of the District Court of the Eastern District of New York in the case of *Fruesteri v. U. S. A. et al.,* 76 Fed. Supp. 667. In that

case, a stevedore was injured while working aboard a Government vessel. He filed a libel against the United States, which in turn impleaded the injured man's employer. The Court held:

> "I find that Tickel (the employer) has duly provided compensation under the Longshoremen's Act for libelant and that this remedy is exclusive." (Authorities cited.)

A careful reading of Section 905 of the Longshoremen's Act, supra, together with an appraisal of the background of the law, dispels any doubt that an employer's liability "is exclusive and in the place of all other liability of such employer", not only as to his employees or dependents and legal representatives of such employees, but also, as expressly stated, "anyone otherwise entitled to recover damages at law or in admiralty on account of such injury or death." A third party certainly comes within the definition of the term "anyone" as set forth in the quoted statute.

Insofar as we have been able to discover, the first and only time that the United States Circuit Court was called upon to pass on this precise question was in the case of *Porello v. U.S.A. et al.,* 153 Fed. (2d) 605, 607. The District Court in that case had rendered a decree in favor of an injured stevedore and against the United States, owner of the public vessel involved. The libelant's employer, who had been impleaded by the Government, was held liable for contribution of one-half. Both respondents appealed. The lower court and the Circuit Court were satisfied that the accident

was due both to the absence of a locking device on the hatch beam and to the negligent order of the injured man's foreman in causing a vehicle to be raised against the hatch beam in question, thereby upsetting it, with the result that the vehicle and some hatch boards fell and struck the libelant. The work was being done pursuant to a stevedoring contract which differed in its wording from the contract in the matter at bar. One of the pertinent provisions was in part as follows:

> "The stevedore * * * shall be responsible for any and all damage or injury to persons and cargo while loading or otherwise handling or stowing the same * * * through the negligence or fault of the stevedores, his employees and servants."

In its original decision, the Circuit Court held (p. 607) as follows:

> "In our opinion the absence of the lock and DiMare's negligent order operated concurrently in producing the result. Hence both the tort feasors would be jointly and severally liable and each should bear one-half of the libelant's damages, *except for the statutory immunity granted by Section 5, 33 USCA, Section 905, which makes the compensation liability exclusive with respect to the employer.*
>
> "For a right of contribution to accrue between tort-feasors, they must be joint wrongdoers in the sense that their tort or torts have imposed a common liability upon them to the party injured. A.L.I. Restitution § 86; 13 Am. Jur., Contribution § 51. *Since the libelant has no cause of action against his employer, the United States can claim*

no contribution on the theory of a common liability which it has been compelled to pay. See *Consolidated Coach Corp. v. Burge,* 245 Ky. 631, 54 S.W. 2d 16, 85 A.L.R. 1086; *Walker v. Kroger Grocery & Baking Co.,* 214 Wis. 519, 252 N.W. 721, 92 A.L.R. 680." (Emphasis added.)

On Petition for Rehearing the Circuit Court held that the foregoing language was not necessary to the opinion since, under the terms of the contract, the stevedore company was obligated to fully indemnify the United States for the loss in question. In this respect the Court stated (p. 609):

> "We are by no means convinced that the rule of *The Chattahoochee,* 173 US 540, 19 S. Ct. 491, 43 L. Ed. 801, which was not previously called to our attention, is controlling in a situation such as this, but the point may be considered left open since determination of the right of contribution is not essential to a decision as to indemnity under the respondent's contract."

In other words, it was held that the point raised may be considered left open, since it was unnecessary to the determination of the case, in view of the indemnifying provision of the contract. But the Court was careful to point out that it was "by no means convinced that the rule of *The Chattahoochee* is controlling in a situation such as this."[4]

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[4]On appeal the United States Supreme Court in *American Stevedores, Inc. v. Porello et al.,* 330 U.S. 445, 91 L. Ed. 1011, affirmed the decree of the Circuit Court as to Porello, but reversed the decree awarding full indemnity to the United States under the stevedoring contract, and remanded the case to the District Court for determination of the meaning of the contract.

Thus, it is clear that we still have as the only expressed opinion of the Circuit Court on the point in question, that the statutory immunity granted by Section 5 (33 U.S.C.A. Section 905) of the Longshoremen's and Harbor Workers' Act, "makes the compensation liability exclusive with respect to the employer" and that in the absence of an indemnifying contract, the employer can not be held liable-over to a third party.

To allow the continuance of the practice of impleading employers in actions of this kind will be to practically eliminate the express intention of the Longshoremen's Act, supra, and to make available to longshoremen and harbor workers the additional, and never-intended, right, in effect, to sue their employers.

CONCLUSION.

By reason of the foregoing, we respectfully submit that the records below in both cases fully support the decrees dismissing Appellee Arrow Stevedoring Company from all liability in the premises. The accident was solely and proximately caused by the unseaworthy condition of the vessel and the negligence of the Government employees in failing to correct the defective conditions after being given prompt notice thereof. The stevedoring contract in any event makes the Government solely liable and relieves Arrow of all liability. Furthermore, by reason of the fact that Arrow had secured compensation coverage under the Long-

shoremen and Harbor Workers' Compensation Act, which is its exclusive liability, the Government may not lawfully recover any part of the sums for which it was held liable under the decrees entered in the court below. Moreover, since the Government failed to take appeals from the decrees in favor of libelants, although it claims to have a valid and complete defense thereto, Arrow cannot be held liable-over for any part of the judgments. It is clear, also, that Arrow is entitled to a lien to the extent of its compensation and medical expenditures, as found and decreed by the trial court.

Dated, San Francisco, California,
December 15, 1948.

Respectfully submitted,
JOHN H. BLACK,
EDW. R. KAY,
Attorneys for Appellee
Arrow Stevedoring Company.

(Appendix Follows.)

Appendix.

Appendix

PART I.

PORTIONS OF STEVEDORING CONTRACT.
(Respondents' Exhibit B in Williams Case.)

Article 26. *Liability and Indemnity.*

(a) The Contractor shall procure and maintain at all times during the continuance of this agreement a policy or policies of insurance with underwriters to be approved by the contracting officer insuring the Contractor against liability for injury to or death of any person or persons to an amount not less than $250,000.00 in any one accident, and for property damage occasioned to any pier, car, lighter, vessel, cargo or other property to an amount not less than $250,000.00 in any one accident arising out of any operations performed hereunder.

(b) The Contractor shall be liable to the Government for any loss or damage which may be sustained by the Government as a result of the negligence or wrongful acts or omissions of the Contractor's officers, agents or employees or through fault of its equipment or gear, subject, however, to the following limitations and conditions:

(1) The Contractor's liability to the Government shall be limited to the sum of $250,000.00 for loss or damage in connection with any single catastrophe, accident or occurrence in the event that any such catastrophe, accident or occurrence and such loss or damage shall arise from or be in any way attributable to or

connected with the presence or proximity of ammunition, explosives, gasoline or other inherently dangerous cargoes or the loading, discharging or handling of such cargo by the Contractor.

(2) The Contractor shall not be responsible to the United States for any loss or damage resulting from any act or omission of any employee of the Government, or resulting from compliance by officers, agents, or employees of the Contractor with specific directions of the Port Director, NTS, Twelfth Naval District. Nor shall the Contractor be so responsible for any such loss or damage resulting from default of ships or other gear supplied by the Government.

(c) The services to be performed in pursuance of the provisions of this contract are incident to war activities of the Government and will include services of a nature normally performed by the Contractor in peace time commercial operations with the risks and hazards normally incident thereto and may involve the loading, discharging, handling, presence or proximity of ammunition, explosives, gasoline, and other inherently dangerous cargoes. It is understood that the consideration herein provided to be made to the Contractor for the services to be performed hereunder have been established with regard only to the normal risks and hazards involved in similar services in peace time commercial operations, but that such consideration does not include any allowance for the additional and extraordinary risks and hazards described above. To induce the Contractor to undertake the performance of such services for the consideration

herein provided, and thus obtain for the Government the resulting benefit of such reduced consideration, the Government will hold the Contractor harmless against any loss, expense (including expense of litigation), and liability to third persons because of death, bodily injury, or property damage or destruction or otherwise of any kind whatsoever, irrespective of negligence of Contractor, his officers, agents, servants or employees; subject, however, to the following conditions and limitations:

(1) The undertaking of the Government shall be applicable and limited to situations where such loss, expense or damage arises out of, results from or is in any way attributable to or connected with the presence or proximity of ammunition, explosives, gasoline, or other inherently dangerous cargoes, or the loading, discharging or handling of such cargo by the Contractor.

(2) The undertaking of the Government shall be applicable and limited to situations where the total and entire amount of such loss, expense, or damage pertaining to any single catastrophe, accident, or occurrence, exceeds the sum of $250,000.00 and further, shall be limited to the excess over and above $250,000.00 of the total and entire amount of such loss, expense and damage, pertaining to any single catastrophe, accident or occurrence.

(3) The undertaking of the Government shall not be applicable, and the Government shall have no obligations or liability in respect of such undertaking or otherwise, in situations where such loss, expense, or

damage is due to willful and deliberate disregard of instructions of the Port Director, NTS, Twelfth Naval District, or to the personal failure to exercise good faith or that degree of care normally exercised in the performance of Contractor's peace time commercial operations by the elected corporate officers of the Contractor or the representative of the Contractor having supervision and direction of all operations at any pier where the Contractor may perform services hereunder.

(4) Notwithstanding any other provision of this contract, the Contractor agrees to waive any right of reimbursement for loss or damage of any kind or character which it may have against the Government under any provision of this agreement if said loss or damage is covered by insurance and Contractor has collected or may collect for said loss or damage from the insurance company. The Contractor further agrees to have attached to and made a part of all insurance policies issued pursuant to this agreement on operations thereunder a rider by the terms of which the insurance company agrees to waive any and all rights of subrogation which it may have against the United States by reason of any payment under said policy.

PART II.

In the District Court of the United States
for the District of Oregon

Civil No. 3884

Leo E. Johnson,
Libelant,
vs.
The United States of America, The War Shipping Administration, and The United States Maritime Commission, and Kaiser Company, Inc. (a corporation), Impleaded,
Respondents.

MEMORANDUM OPINION

This case raises the question whether a ship sued for an accident to a harbor worker can implead and claim contribution from the harbor worker's employer, in disregard of the provisions of the Longshoremen's and Harbor Workers' Compensation Act that the liability for compensation "shall be exclusive".

I have deferred decision of the question until I could have the benefit of the argument of the senior member of the admiralty bar, Mr. Erskine Wood, in another case. Mr. Wood feels that an employer can

be impleaded, and cites *American Stevedores v. Porello,* 330 U.S. 446, 458, and a number of District Court decisions.

First, let me say I do not think the Supreme Court's language in the *Porello* case justifies the claim that is made for it. The Court was primarily concerned with other questions.

Judge Inch, alone of the eastern admiralty judges, has held, and I confess by dictum only, that the injured harbor worker's employer cannot be sued. *Frusteri v. United States,* 76 F. Supp. 667. I am going along with Judge Inch. We are supported strongly, I feel, by the consideration given to the question by the Second Circuit Court of Appeals in the *Porello* case, on its way up. 153 F. 2nd 605.

In my time, compensation supplanted litigation in the industrial field. The State of Washington was the first, and Oregon was one of the earliest States, to pass compensation laws. This was because of the paramount influence of the logging and lumbering industry in both States. The cruel injustice to workmen in this industry, where the percentage of casualty was high, of leaving injured workmen to the harsh and inadequate remedies provided by the common law, brought about the passage of compensation acts. The movement swept the country.

To hold that an employer under a *compulsory* (as to him) compensation act can be sued indirectly, as proposed here, is like opening a hole in a dike. It destroys the basic principle of compensation. As well

say the employer can be offered to the injured workman as a co-defendant, under Rule 56. The difference is a matter of words only.

Dated, June 19, 1948.

Claude McColloch,
Judge.